



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Betakut USA Inc.

**File:** B-234282

**Date:** May 8, 1989

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### DIGEST

Protest is denied where protester fails to show that the contracting agency's determination of financial nonresponsibility, based on information presented by the protester in its financial report, was unreasonable.

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### DECISION

Betakut USA Inc., protests the award by the General Services Administration (GSA) under invitation for bids (IFB) No. FCEP-CR-F8010-S of solicitation item No. 3 for 7-inch tailors shears, national stock number 5110-00-293-9199. The subject IFB was issued on July 22, 1988, for a 2-year fixed price contract for a variety of line item requirements for scissors and shears. Award was to be made on an item by item basis. The protester contends that the award was improper because Betakut was "qualified" to receive the award and its bid price was lower than that of the awardee. The protester also alleges that the agency acted in bad faith in finding Betakut nonresponsible.

We deny the protest.

After the low bidder on line item No. 3 was determined to be nonresponsible, Betakut, the next low bidder, was in line for the award. For this line item, Betakut's bid price was \$2.71 per pair of scissors for an estimated contract value of \$1,187,508, and a guaranteed minimum value of \$593,755, for the requirements for the period of November 1, 1988, through October 31, 1990.

On October 17, the agency requested that a pre-award survey be conducted upon Betakut. In addition, by a form letter dated October 19, 1988, GSA requested that Betakut provide financial statements to facilitate the agency's assessment of the firm's financial responsibility for the award. The

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October 19 letter informed the protester that the financial statements "must be submitted on the legally liable entity," and that consolidated company financial statements would not be acceptable unless they show the specific financial status of the "bidding entity," or are accompanied by a corporate guaranty.

On October 28, 1988, Betakut submitted to GSA a financial statement which listed a Canadian bank reference and stated that all its bank loans are secured by the guaranty of its Italian parent company, Betakut S.P.A., from which it also purchases all its merchandise. Betakut's financial statement indicated the firm had a negative net worth, a significant total debt that exceeded its working capital, and negligible net-fixed assets.1/

On November 1, 1988, Betakut received a negative pre-award survey report in the areas of plant facilities and performance of recent contracts. Specifically, the plant facilities report indicated that the available storage area at Betakut's plant was insufficient to accommodate the volume of the contract. The report noted that although additional "bonded warehouse space" was available in Charleston, South Carolina (the location of the company at the time of the survey), the protester presented no documentary evidence of the commitment of such space. The report also stated that Betakut expressed plans to relocate its facility from South Carolina to the West Coast in the near future due to storage problems at its then current location, and noted that the protester's Charleston facility was, at the time the survey was conducted, posted for sale.2/

The facilities report further noted the failure of grass shears, supplied by the protester under a prior GSA term contract, to meet specification requirements for blade hardness. In connection with this production deficiency, the report indicated a possible problem in the company's

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1/ We do not disclose the precise figures since they may be proprietary to Betakut.

2/ In this connection, the individual who conducted the survey expressed concern as to the possibility that the disruption of relocating its business during the scheduled period of contract performance would impact upon Betakut's ability to make timely deliveries. The protester maintains its relocation would cause no such disruption since it is a distributor, not a manufacturer.

quality control system at the point of manufacture. Finally, the agency reported that between December 1987 and April 1988, the protester had been delinquent in the delivery of 12 purchase orders for tailors shears, and that a check of the agency's performance history records for successful performance of GSA contracts by Betakut revealed no recent contracts for the subject line item besides the 12 delinquent orders.

Thus, because of the firm's negative net worth, weak asset base and low net income, the contracting officer determined the protester to be financially nonresponsible for award of item No. 3, in view of the relatively high monetary value (\$1,187,508) of the proposed contract. Betakut was also determined to be nonresponsible on the basis of its negative plant facilities report, as well as its recent production problems.

The contracting officer referred the question of Betakut's responsibility to the Small Business Administration (SBA) for a determination of competency since Betakut is a small business concern. The SBA, however, informed GSA that the firm was not eligible for a certificate of competency (COC) under the solicitation because it was not offering an end product manufactured in the United States. 13 C.F.R. § 125.5(b)-(c) (1988). Consequently, on December 22, GSA awarded the contract for line item No. 3 to the next low bidder, who proposed a unit price of \$4.44 per pair for a total estimated line item amount of \$1,945,084.

Ordinarily the SBA has final authority to make determinations of competency concerning a small business concern, but where, in accordance with its previously referenced policy, the SBA declines jurisdiction to consider a request for a COC for a nonmanufacturer which is not supplying a domestic product, it is appropriate for our Office to consider the responsibility matter. Nova International, Inc., B-227696, Sept. 21, 1987, 87-2 CPD ¶ 284, at 3.

Under the Federal Acquisition Regulation (FAR), before award of a contract may be made to a prospective contractor, the contracting officer must make an affirmative determination of that contractor's responsibility; that is, the contractor's ability to meet certain general standards, among which are: (1) possession of adequate financial resources to perform the contract or the ability to obtain such resources; (2) the ability to comply with the required delivery schedule; and (3) a satisfactory performance record. FAR § 9.104-1(a), (b), and (c) (FAC 84-18); Oertzen & Co., GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158. In making a responsibility determination, the

contracting officer is vested with a wide degree of discretion and must of necessity rely upon his or her business judgment in exercising that discretion. Firm Reis GmbH, B-224544; B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. While the responsibility determination should be based on facts and reached in good faith, the ultimate decision is appropriately left to the discretion of the contracting agency because it must bear the effects of any difficulties experienced in obtaining the required performance. Id. For these reasons, our Office generally will not question a contracting officer's nonresponsibility determination absent a showing by the protester that the determination lacks any reasonable basis or was made in bad faith. Gulton Industries, Inc., B-227132, Aug. 19, 1987, 87-2 CPD ¶ 179.

Betakut contends that GSA improperly and unreasonably determined it to be nonresponsible. Concerning the financial nonresponsibility determination, the protester states that its financial capability is evidenced by the volume of GSA scissors and shears contracts which Betakut S.P.A. financed "on an open account basis" from 1960 through 1982. The protester also disputes the validity of the plant facilities report with respect to aspects of its performance record.

Since the agency's finding that the protester lacks financial capability reasonably supports its nonresponsibility determination, it is not necessary that we resolve the disputes concerning the pre-award survey and Betakut's performance record.

Throughout its protest submissions, Betakut maintains that its financing of prior sizable contracts with the GSA "clearly proves our . . . ability to finance much larger quantities" than required under item No. 3 of the subject IFB. Betakut states that the contracting officials did not inform it as to what kind of evidence the agency required to demonstrate its financial capability, but that it informed the contracting officer that it could provide any documentation GSA required as evidence of its financial capability.

However, prior to award, Betakut submitted financial documentation on itself alone and only offered a guaranty through its Italian parent corporation, Betakut S.P.A., the manufacturer of the products the protester markets. Although GSA had informed the protester in the October 19 letter of the requirement for a showing of the financial sufficiency of the legally liable entity (here, Betakut USA Inc.) or a corporate guaranty, the information submitted by the protester did not meet GSA's stated requirements. The

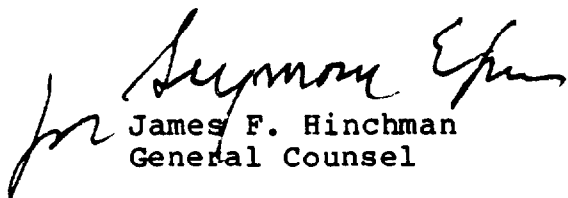
agency explains that it will not accept guarantees from foreign businesses because of the difficulty of making collections in the event the contractor defaults.

We have recognized that the specific financial qualifications to be considered in determining responsibility are within the contracting officer's discretion and business judgment. Nova International, Inc., B-227696, supra. Further, a contracting officer may base a determination of nonresponsibility upon the evidence in the record without affording bidders the opportunity to explain or otherwise defend against the evidence, and there is no requirement that bidders be advised of the determination in advance of the award. LD Research Corp., B-230912.3, Sept. 9, 1988, 88-1 CPD ¶ 223; Firm Reis GmbH, B-224544; B-224546, supra.

The record shows that Betakut's annual sales for the period covered by its financial report only slightly exceeded the estimated annual value of the proposed contract; that it has a negative net worth and negligible assets; and that it has a significant debt that exceeded its working capital. Although the protester asserts that the agency improperly analyzed its financial statement, it does not specifically explain in what manner the agency's analysis of that statement was erroneous or dispute any particular aspects of the agency's analysis. Thus, based on the information the protester provided to the agency, GSA reasonably concluded that the protester's finances were marginal, considering the estimated dollar value of the contract. Under these circumstances, we do not find that the contracting officer's determination of financial nonresponsibility was without any reasonable basis.

While Betakut disagrees with the contracting officer's determination, contracting officers are presumed to act in good faith, and to make a showing otherwise, a protester must demonstrate by irrefutable proof that the contracting officer had a specific and malicious intent to injure the protester. LD Research Corp., B-230912.3, supra, 88-1 CPD ¶ 223 at 4. Betakut has not met this burden of proof.

We conclude, therefore, that the protester has failed to show that the agency lacked any reasonable basis or acted in bad faith in finding it nonresponsible for award of the proposed contract. The protest is denied.

  
James F. Hinchman  
General Counsel